Anuar Abdul Aziz v Public Prosecutor

HIGH COURT (SEREMBAN) — CIMINAL APPEALS NO 42–57 OF 2002 AND 42–59 OF 2002
LOW HOP BING J
25 APRIL 2005

Criminal Law — Acting as investment adviser without licence — Whether custodial sentence called for — Securities Industry Act 1983 ss 14(1) & 123

Criminal Procedure — Prosecution — Conduct of — Authority to prosecute — Whether Security Commission officers duly authorised to prosecute — Securities Industry Act 1983 s 126(2) — Criminal Procedure Code s 377

Criminal Procedure — Search — Seizure — Search and seizure in respect of securities offence — Failure to comply with s 36A of the Securities Commission Act 1993 — Whether fatal to admissibility of seized exhibits

The accused was charged under ss 14(1) and 123 of the Securities Industry Act 1983 ('the SIA') for acting as an investment adviser without an investment adviser's licence. He was convicted and fined RM150,000 in default of 12 months' imprisonment. He appealed against conviction and sentence. The Public Prosecutor cross-appealed against sentence. Counsel for the accused raised the following issues: (1) the prosecuting officers had not been duly authorised to conduct the prosecution in the trial court; (2) the charge alleged the commission of the offence under s 14(1) on 25 February 1994, whereas the SIA 1983 only came into force with effect from 7 March 1996; (3) the prosecution through SP18 failed to comply with s 36A of the Securities Commission Act 1993, as a result of which the exhibits seized were inadmissible and the failure to produce a search list had given rise to an adverse inference; (4) there was no nexus between the accused and the exhibits seized; (5) SP18's evidence should be ignored since SP18 was both the complainant and the investigating officer; (6) the accused did not 'carry on business' for the purposes of s 2 of the SIA; (7) the accused was not acting as an investment adviser but rather the International Entrepreneurs Network Corporation Sdn Bhd ('IEN') and thus the IEN should be liable; (8) the court should draw an adverse inference under s 114(g) of the Evidence Act 1950 as the prosecution failed to produce two police report, viz, Bahau Report IP/No 12/94 and Dang Wangi Report 23088/94, thereby depriving the accused of the right to cross-examine the makers; (9) the trial had not duly considered the defence evidence; (10) the trial court failed to correctly consider the standard of proof required throughout the trial; (11) the accused was a 47-year-old first offender who had committed a technical offence for which a non-custodial sentence was justified. The prosecution however cross-appealed for a heavier sentence.

Held, dismissing the appeal and the cross-appeal:

(1) It was clear from the appeal record that the letter of authorisation under s

377(b) of the CPC had been tendered in the trial court. Further, the provisions of s 126(2) of the Securities Industry Act 1983 and s 377 (b) of the CPC had been duly complied with. The defence had therefore raised a non-issue (see paras 20 and 24).

(2) Section 1 of the SIA provides that the SIA 1983 'shall come into operation on such date as the Minister may, by notification in the Gazette, appoint'. A perusal of the Gazette PU(B) 332/83 revealed that the Minister had appointed 7 July 1983 as the date the SIA 1983 should come into operation. There could be no two views about this fact (see paras 27–28).

(3) Section 36A(1) of the Securities Commission Act 1993, which provides for the procedure for seizure of things, came into force on 1 November 1998 vide Act A1041, whereas SP18 conducted an inspection of the accused's premises on 18 April 1994. Hence, the defence could not rely on s 36A. Be that as it may, the trial judge accepted SP18's evidence that after seizure, he did issue an original search list to the accused who then acknowledged receipt thereof. On the facts, the trial judge had correctly accepted SP18's evidence on the non-production of the search list as reasonable and probable (see paras 52–54).

(4) Exhibit P26 — the accused's business card was produced through the printer (SP4). Exhibits P32(1)–(28) the transparencies used by the accused had been proved through SP4 the printer and SP14 IEN's administrative officer in the form of primary evidence in accordance with the best evidence rule as they were produced for the inspection of the trial court under ss 61, 62 and 64 of the Evidence Act 1950. Further, it should be observed that the production of the exhibits P26 and P32(1)–(28) by SP5 and SP18 had not been challenged by the defence in cross-examination. It is trite law that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony (see para 71–73).

(5) In order to establish SP18's conflict of interest and prejudice, there had to be some evidence adduced by the defence through the cross-examination of SP18. However this was never done (see para 77).

(6) The trial judge found that the accused had acted as an investment adviser by giving investment advice as a commercial enterprise and in the form of suggestions or recommendations to a specific person or group of persons in relation to investing in the KLSE securities. That required technical analysis on fundamentals, by showing the form and history of the movement in the price of the shares in charts and transparencies, for the purpose of giving indications of when to buy or sell those securities, systematically and regularly. The paraphernalia used by the accused consisted of system and continuity. The complete factual matrix established in the evidence adduced by the prosecution in its entirety showed that it was not confined to the seminar per se held in the Bahau Rest House on 25 February 1994. The finding of facts by the trial court clearly came within para (a) or (b) in the definition of 'investment adviser' under s 2 of the SIA (see para 83).

(7) On the facts, the accused could not apply and hide behind the corporate veil for the purposes of attributing to IEN the carrying on of the business as investment adviser. There was overwhelming evidence that he personally

conducted such business and acted as an investment adviser. IEN was merely a vehicle used by him to suit his convenience. He certainly could not use the veil as a cloak to avoid his liability under the SIA 1983 (see para 89).

(8) Bahau Report IP/No 12/94 was the investigation paper compiled by SP18 whereas Dang Wangi Report No 23088/94 was the report on the accused's arrest. They were not first information reports. Non-production of these reports attracted no adverse inference under s 114(g) of the Evidence Act 1950. Such an inference could only be drawn if there was withholding or suppression of important and material evidence and not merely a failure to obtain evidence (see paras 91 and 96).

(9) Upon a proper perusal of the appeal record, it was clear that the trial judge had undertaken an assessment and evaluation of the evidence adduced, having regard to the demeanour, veracity, reliability and credibility of the witnesses. The finding was not against the weight of evidence. An appellate court will not readily interfere with such finding as it is a primary duty entrusted to the trial court see para 101).

(10) The trial judge had after a maximum evaluation of all prosecution evidence, applied the standard of proof beyond reasonable doubt in finding that the prosecution had established all the ingredients of the charge under s 14 of the SIA 1983, thereby calling the accused to enter upon his defence. The trial judge had arrived at a correct finding based on the standard of beyond reasonable doubt. The evidence adduced before the trial court was overwhelming (see paras 106 and 110).

(11) The trial judge's grounds of decision indicated that he considered the public interest which had been balanced with the accused's individual interest, having regard to the facts and circumstances of the case. The trial judge had occasioned no error in the exercise of discretion in imposing the sentence (see para 117).

[Bahasa Malaysia summary

Tertuduh telah didakwa di bawah ss 14(1) dan 123 Akta Perindustrian Sekuriti 1983 ('APS') kerana bertindak sebagai penasihat pelaburan tanpa lesen. Beliau telah disabit kesalahan dan didenda RM150,000 sebagai ganti 12 bulan penjara. Beliau membuat rayuan terhadap sabitan dan hukuman. Pendakwa Raya membuat rayuan balas terhadap hukuman. Peguam bagi tertuduh membangkitkan isu-isu berikut: (1) pegawai pendakwa tidak diberikan kuasa untuk membuat pendakwaan dalam mahkamah bicara; (2) dakwaan menyatakan bahawa kesalahan di bawah s 14(1) telah dilakukan pada 25 Februari 1994, manakala APS 1983 hanya berkuatkuasa pada 7 Mac 1996; (3) pihak pendakwa, melalui SP18, telah gagal untuk mematuhi s 36A Akta Suruhanjaya Sekuriti 1993, dan sebagai kesannya, eksibit yang dirampas tidak boleh diterima dan kegagalan untuk mengemukakan senarai carian telah menimbulkan andaian yang memudaratkan; (4) tiada pertalian di antara tertuduh dan eksibit yang dirampas; (5) keterangan SP18 perlu diabaikan kerana SP18 adalah merupakan pengadu dan juga pegawai penyiasat; (6) tertuduh tidak 'menjalankan perniagaan' bagi tujuan s 2 APS; (7) tertuduh tidak bertindak sebagai penasihat pelaburan tetapi sebagai International Entrepreneurs Network Corporation Sdn Bhd

('IEN') dan oleh itu, IEN sepatutnya bertanggungjawab; (8) mahkamah patut membuat andaian yang memudaratkan di bawah s 114(g) Akta Keterangan 1950 memandangkan pendakwa telah gagal untuk mengemukakan dua laporan polis, iaitu Laporan Bahau IP/No 12/94 dan Laporan Dang Wangi 23088/94, dan oleh itu menafikan hak tertuduh bagi pemeriksaan balas terhadap pembuat laporan; (9) perbicaraan tidak mempertimbangkan keterangan pembelaan dengan sewajarnya; (10) mahkamah bicara gagal untuk mempertimbangkan dengan betul beban pembuktian yang dikehendaki dalam perbicaraan; (11) tertuduh merupakan pesalah kali pertama berumur 47 tahun yang telah melakukan kesalahan teknikal yang mana hukuman yang wajar adalah hukuman tanpa hukum tahanan. Pihak pendakwa membuat rayuan balas untuk hukuman yang lebih berat.

Diputuskan, menolak rayuan dan rayuan balas:

(1) Adalah jelas daripada rekod rayuan bahawa surat berikuasa di bawah s 377(b) KAJ telah dikemukakan dalam mahkamah bicara. Selain itu, peruntukan s 126(2) APS dan s 377(b) KAJ telah dipatuhi. Oleh itu, pihak pembelaan telah membangkitkan perkara bukan isu (lihat perenggan 20 dan 24).

(2) Seksyen 1 APS menyatakan bahawa APS 1983 'shall come into operation on such date as the Minister may, by notification in the Gazette, appoint'. Semakan pada Gazette PU(B) 332/83 menunjukkan Menteri telah menyatakan 7 Julai 1983 sebagai tarikh berkuatkuasanya APS 1983. Tiada dua pandangan berkenaan perkara ini (lihat perenggan 27–28).

(3) Seksyen 36A(1) Akta Suruhanjaya Sekuriti 1993, yang memberi peruntukan mengenai prosedur untuk rampasan barang-barang, berkuatkuasa pada 1 November 1998 melalui Akta A1041, manakala SP18 telah menjalankan pemeriksaan ke atas premis tertuduh pada 19 April 1994. Oleh itu, pembelaan tidak boleh bergantung kepada s 36A. Walau bagaimanapun, hakim bicara telah menerima keterangan SP18 dan selepas rampasan, beliau telah memberi sesalinan asal senarai carian kepada tertuduh yang kemudiannya telah mengakui penerimaan. Berdasarkan fakta tersebut, hakim bicara telah dengan betulnya menerima keterangan SP18 berkenaan dengan kegagalan mengemukakan senarai carian sebagai berpatutan dan berkemungkinan (lihat perenggan 52–54).

(4) Eksibit P26 — kad perniagaan tertuduh telah dikemukakan melalui pencetak (SP4). Eksibit P32(1)–(28) transparensi yang digunakan oleh tertuduh telah disemak melalui pencetak SP4 dan pegawai pentadbiran IEN SP14 dalam bentuk keterangan primer menurut aturan keterangan terbaik apabila dikemukakan untuk pemeriksaan mahkamah bicara di bawah ss 61, 62 dan 64 Akta Keterangan 1950. Selanjutnya, perlu diambil perhatian bahawa eksibit P26 dan P32(1)–(28) oleh SP5 dan SP18 tidak dicabar oleh pihak pembela dalam pemeriksaan balas. Adalah undang-undang mantap bahawa kegagalan untuk mengadakan pemeriksaan balas terhadap seseorang saksi pada bahagian penting sesuatu kes adalah merupakan penerimaan testimoni saksi tersebut (lihat perenggan 71 dan 73).

(5) Untuk mewujudkan percanggahan kepentingan dan prejudis terhadap SP18,

perlu terdapat keterangan yang didapati oleh pihak pembelaan melalui pemeriksaan balas terhadap SP18. Walau bagaimana pun, perkara ini tidak dilakukan (lihat perenggan 77).

(6) Hakim bicara mendapati bahawa tertuduh telah bertindak sebagai penasihat pelaburan dengan memberi nasihat sebagai perusahaan komersial berkenaan pelaburan dan dalam bentuk cadangan atau syor kepada orang perseorangan yang spesifik atau berkumpulan berkaitan dengan pelaburan di sekuriti BSKL. Perkara ini memerlukan analisa teknikal terhadap perkara utama, dengan menunjukkan cara dan sejarah perubahan harga saham pada carta dan transparensi, dengan tujuan untuk memberi petunjuk masa untuk membeli atau menjual sekuriti, secara sistematik dan secara tetap. Peralatan yang digunakan oleh tertuduh terdiri daripada sistem dan kesinambungan. Latar belakang fakta yang ditunjukkan oleh pendakwa secara keseluruhannya menunjukkan bahawa ianya tidak hanya terbatas kepada seminar yang diadakan di Rumah Rehat Bahau pada 25 Februari 1994. Penemuan fakta oleh mahkamah bicara dengan jelasnya termasuk dalam perenggan (a) atau (b) dalam pengertian 'penasihat pelaburan' di bawah s 2 APS (lihat perenggan 83).

(7) Berdasarkan fakta-fakta, tertuduh tidak boleh memohon dan berselindung di sebalik tabir pemerbadanan bagi tujuan untuk menyatakan bahawa perniagaan dijalankan untuk IEN. Terdapat banyak keterangan yang menunjukkan bahawa beliau secara peribadi telah menjalankan perniagaan tersebut dan bertindak sebagai seorang penasihat pelaburan. IEN hanyalah satu alat yang digunakan oleh beliau bagi kemudahan sendiri. Beliau sememangnya tidak dapat menggunakan tabir itu sebagai melindungi dirinya daripada APS 1983 (lihat perenggan 89).

(8) Laporan Bahau IP/No 12/94 adalah kertas siasatan yang dikumpulkan oleh SP18 manakala Laporan Dang Wangi No 23088/94 adalah laporan mengenai penahanan tertuduh. Kedua-duanya bukanlah laporan keterangan pertama. Tiadanya pengemukaan laporan-laporan ini tidak menyebabkan andaian memudarat di bawah s 114(g) Akta Keterangan 1950. Andaian sebegitu hanya boleh dibuat sekiranya ada keterangan material atau penting yang disembunyikan dan bukan hanya kegagalan untuk mendapatkan keterangan (lihat perenggan 91 dan 96).

(9) Hasil semakan teliti ke atas rekod rayuan jelas menunjukkan bahawa hakim bicara telah membuat pemerhatian dan penilaian ke atas keterangan yang dikemukakan, dengan mengambil kira perwatakan, kebolehpercayaan, kebergantungan dan kredibiliti saksi-saksi. Penemuan tersebut tidak bercanggah dengan keterangan. Mahkamah rayuan tidak akan campur tangan dalam penemuan sebegitu kerana ianya adalah tugas utama yang diberikan kepada mahkamah bicara (lihat perenggan 101).

(10) Hakim bicara, setelah membuat penilaian maksimum ke atas semua keterangan pihak pendakwa, dengan menggunakan tahap pembuktian tanpa keraguan munasabah bahawa pihak pendakwa telah membuktikan kesemua unsur pertuduhan di bawah s 14 APS 1983, seterusnya memanggil tertuduh untuk memasuki pembelaan. Hakim bicara telah membuat penemuan yang

betul bardasarkan tahap pembuktian tanpa keraguan munasabah. Keterangan yang dikemukakan di hadapan hakim bicara adalah begitu banyak (lihat perenggan 106 dan 110).

(11) Alasan-alasan keputusan hakim bicara menunjukkan bahawa yang arif telah mempertimbangkan kepentingan awam yang telah diseimbangkan dengan kepentingan individu tertuduh, berdasarkan fakta-fakta dan keadaan kes. Hakim bicara tidak membuat kesilapan semasa menggunakan budi bicaranya untuk menjatuhkan hukuman (lihat perenggan 117).]

Notes

For cases on conduct on prosecution generally, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2771–2775.

For a case on seizure, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) para 3053.

Cases referred to

Abdul Manaf Mohd bin Ghows & Ors v Nusantara Timur Sdn Bhd & Ors [1996] MLJU 130 (refd)
Abdullah bin Yaacob v PP [1991] 2 MLJ 237 (refd)
Abdullah Zawawi v PP [1985] 2 MLJ 16 (refd)
AK Koh Enterprise Sdn Bhd v PP [2000] 6 MLJ 184 (refd)
Arulpragasan a/l Sandaraju v PP [1997] 1 MLJ 1 (refd)
Ayoromi Helen v PP [2005] 1 CLJ 1 (refd)
Balanchandran v PP [2005] 2 MLJ 301 (refd)
Chin Khing Siong v Rex [1952] MLJ 74 (refd)
Emperor v Khwaja Nazir Ahmad AIR 1945 PC 18 (refd)
Hasanuddin bin Abd Hamid v Public Prosecutor [2002] 2 MLJ 157 (refd)
Hyde v Sullivan & Ors [1956] SR (NSW) 113 (refd)
K Saravanan a/l S Karuppiah v Public Prosecutor [2002] 3 MLJ 465 (refd)
Lim Guan Eng v PP [2000] 2 MLJ 577 (refd)
Mat v PP [1963] MLJ 263 (refd)
Mohamed Jusoh bin Abdullah & Anor vs PP [1947] MLJ 130 (refd)
Mohd Jalani bin Saliman & Anor v PP [1997] 5 MLJ 551 (refd)
Mohd Osman bin Pawan v PP [1989] 2 MLJ 110 (refd)
Munusamy v PP [1987] 1 MLJ 492 (refd)
Ooi Hock Leong v Regina [1955] MLJ 229 (refd)
Pavone v PP (No 2) [1986] 1 MLJ 423 (refd)
Pendakwa Raya v Rang Ho Soh [1992] 1 MLJ 360 (refd)
PP v Abdul Latiff bin Abdullah [1995] MLJU 219 (refd)
PP v Abdul Razak bin Johari [1991] 1 MLJ 105 (refd)
PP v Foong Chee Cheong [1970] 1 MLJ 97 (refd)
PP v Krishna Rao a/l Gurumurthi & Ors [2000] 1 MLJ 274 (refd)
PP v Lew Koy [2001] 4 MLJ 655 (refd)
PP v Lin Lian Chen [1991] 1 MLJ 316 (refd)
PP v Loo Chang Hock [1988] 1 MLJ 316 (refd)
PP v Md Nor bin Hamid [2004] 5 MLJ 97 (refd)
PP v Mohamad Musa bin Amarullah [2002] 1 MLJ 561 (refd)
PP v Roslan bin Imun [1999] 3 MLJ 659 (refd)
PP v Shari Mohd Shariff [2005] 5 CLJ 439 (refd)

PP v Yuvaraj [1969] 2 MLJ 89 (refd)
Rajendran M Gurusamy v PP [2001] 1 CLJ 631 (refd)
Ramli Kechik v PP [1986] 1 CLJ 308; [1986] CLJ (Rep) 243 (refd)
Reg v Khoo Quan Teik [1957] MLJ 128 (refd)
Repco Holdings Bhd v PP [1997] 3 MLJ 681 (refd)
Rex v Leo De Cruz [1935] MLJ 1 (refd)
Rex v Tea Cheng Lion [1949] MLJ 170 (refd)
Saminathan & Ors v Public Prosecutor [1955] 21 MLJ 121 (refd)
San Soo Ha v Public Prosecutor [1968] 1 MLJ 34 (refd)
Subramaniam a/l Arumugam v Public Prosecutor [2000] 2 MLJ 193 (refd)
Tan Cheng Kooi & Anor v Public Prosecutor [1972] 2 MLJ 115 (refd)
Tan Koh Keng v Public Prosecutor [1962] MLJ 193 (refd)
Teoh Hoe Chye v Public Prosecutor [1987] 1 MLJ 220 (refd)
Thavanathan a/l Balasubramaniam v Public Prosecutor [1997] 2 MLJ 401 (refd)
Trade Facilities Pte Ltd & Ors v Public Prosecutor [1995] 2 SLR 475 (refd)
Wong Swee Chin v Public Prosecutor [1981] 1 MLJ 212 (refd)

Legislation referred to
Criminal Procedure Code (Amendment) Act 1998 s 6(a) 376(i), (iii) 377(a)
Criminal Procedure Code s 377(b)
Federal Constitution art 145(3)
Securities Commission Act 1993 s 39(1), (2)
Securities Industry Act 1983 ss 14(1), 123, 126(1), (2)Securities Industry Act 1983 ss 14(1), 123, 126(1), (2)

John Fernandez (Gooi Soon Seng with him) (Fernandez & Partners) for the defendant.
Roz Mawar Rozain (Nur Ishqi Hayati bte Zakaria and Ariff bin Adnan Zain with her) (Deputy Public Prosecutor, Securities Commissions) for the prosecutor.

Low Hop Bing J:

APPEALS

[1] Before me are the following appeals:

(1) by the accused against the entire decision of the learned sessions court judge in Seremban ('the trial judge') who had on 7 June 2002 convicted the accused of the offence under s 14(1) of Securities Industry Act 1983, and imposed a fine of RM150,000 or in default 12 months imprisonment ('the sentence'), under s 123 of the same Act; and

(2) the learned Public Prosecutor against the sentence.

.

THE CHARGE

[2] The charge preferred against the accused reads:

Bahawa kamu pada 25 Februari 1994 di antara jam lebih kurang 8.30 malam dan jam lebih kurang 11.30 malam di Rumah Rehat Bahau, 580, Jalan Taman Bunga, dalam daerah

Bahau, Negeri Sembilan, telah bertindak sebagai seorang penasihat pelaburan tanpa memegang suatu lesen penasihat pelaburan yang sah di bawah Akta Perindustrian Sekuriti 1983 (Akta 280); dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah s 14(1) Akta tersebut dan kamu boleh dihukum di bawah s 123 Akta tersebut.

[My translation:

That you on 25 February 1994 between the hours of about 8.30 pm and 11.30 pm in the Bahau Rest House, 580 Jalan Taman Bunga, in the district of Bahau, Negeri Sembilan, acted as an investment adviser without being the holder of an investment adviser's licence under the Securities Industry Act 1983 (Act 280); and you have thereby committed an offence under s 14(1) of the said Act, punishable under s 123 thereof.]

[3] Unless the context otherwise requires, a reference hereinafter to a section is a reference to that section in the Securities Industry Act 1983 ('SIA 1983').

.

AUTHORITY TO PROSECUTE

[4] Learned defence counsel Mr John Fernandez (Mr Gooi Soon Seng appeared with him on 25 April 2005) submitted that the trial was null and void as the prosecuting officers viz Mr Shamsul Jafri Safie, Miss WK Wong and Miss Roz Mawar Rozain had not been authorised under s 126(1) and (2), read with s 39(1) and (2) of the Securities Commission Act 1993 ('SCA 1993') to conduct the prosecution in the trial court.

[5] For the prosecution, it was contended by learned deputy public prosecutor Miss Roz Mawar Rozain, and assisted by officers Miss Nur Ishqi Hayati bt Zakaria and Mr Ariff bin Adnan Zain that s 126, and s 377(b) of the Criminal Procedure Code ('CPC') would apply, and that there is no requirement for the prosecution to produce or file the authorisation letter in the trial court, but merely to show it to the trial court which had been done and a copy had been given to the defence, as there was no such challenge in the trial court. Reference was made to:

(1) *Public Prosecutor v Lew Koy* [2001] 4 MLJ 655; and

(2) *AK Koh Enterprise Sdn Bhd v Public Prosecutor* [2000] 6 MLJ 184.

[6] I shall determine the merits of this challenge by examining the aforesaid statutory provisions.

[7] Section 126(2) provides for the conduct of prosecution, as follows:

(1) ...

(2) Any officer authorised in writing by the Public Prosecutor, may prosecute any case in respect of any offence committed under this Act.

[8] Section 126 empowers an officer to prosecute any case in respect of any offence committed under the SIA 1983 if the officer has been authorised in writing by the Public Prosecutor.

[9] Section 39(1) of the SCA 1993 reads: A

(1) No prosecution for any offence under this Act shall be instituted except with the consent in writing of the Public Prosecutor.

[10] A cursory glance at s 39(1) SCA 1993 clearly shows that it has no application here as there is no prosecution for an offence under that Act. B

[11] Section 377(b) of the CPC, where relevant, is reproduced as follows:

377. Conduct of prosecutions in court. Every prosecution before any court … shall, subject to the following sections, be conducted — (a) by … a Deputy Public Prosecutor …; C

(b) subject to the control and direction of the Public Prosecutor, by the following persons who are authorised in writing by the Public Prosecutor:

(1) …;
(2) …;
(3) …; D
(4) …;
(5) an officer of any statutory authority or body; or
(6) …

[12] Section 377(b) was brought about by s 6(a) of the CPC (Amendment) Act 1998 (Act A1015) with effect from 1 April 1998 vide PU(B) 134/98, as a result of the decision of the High Court in *Repco Holdings Bhd v Public Prosecutor* [1997] 3 MLJ 681 (see *Mallal's Criminal Procedure* (5th Ed) [1998] MLJ page I 5962). E

[13] In my view, s 377(b) CPC enumerates, *inter alia,* the officers who shall have the authority to conduct a prosecution before any court so long as the officer is subject to the control and direction of the Public Prosecutor and has been authorised in writing by the Public Prosecutor. F

[14] It is significant to observe that the intention of Parliament expressed in s 126(1) and (2), and s 377(b) of the CPC is to conduce to or facilitate and not to impede the proper conduct of prosecution, in addition to ensuring that a reasonable standard and quality is maintained in the conduct of prosecution. G

[15] There seems to be a slight divergence of views as to whether it is incumbent on the prosecution to tender the written authority at the trial. H

[16] It has been held by VT Singham JC (now J) in *Public Prosecutor v Lew Koy*, at p 666 that the written authority under s 377(b) of the CPC need not be tendered or filed in court, but only to show to the court if ever there is any challenge that the prosecuting officer did not have the authority in writing of the Public Prosecutor to conduct the prosecution. I

[17] However, in *AK Kok Enterprise Sdn Bhd*, Muhammad Kamil J (as he then was) held at pp 186–188 that the non-production of the authorisation letter deprived the court of jurisdiction to hear the case.

A **[18]** In *Rajendran a/l M Gurusamy v Public Prosecutor* [2000] 4 MLJ 639 Abdul Wahab Patail J held, inter alia, that the prosecution ought to have tendered evidence of authorisation by the Attorney General.

[19] Be that as it may, the authority to prosecute at the trial court and now in this **B** appeal before me does not appear to pose any serious problem at all.

[20] Page 45 of the appeal record reveals that when Mr Shamsul Jafri Safie conducted the prosecution, he did tender the letter of authorisation. Similarly, p 103 of the appeal record shows that when Miss Neetasha Rauf appeared with Miss Roz **C** Mawar for the prosecution, the letter of authorisation has been tendered pursuant to s 377(b) of the CPC.

[21] Further Miss Roz Mawar is a deputy public prosecutor whose power to prosecute has been amply set out in ss 376 and 377(a) of the CPC read with art **D** 145(3) of the Federal Constitution.

[22] Article 145(3) of the Federal Constitution provides for the Attorney General's power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, while s 376(i) of the CPC says that the Attorney General shall be the Public Prosecutor who shall have the control and direction of all **E** prosecutions and proceedings under the Code, and under s 376(iii), deputy public prosecutors who are appointed by the Public Prosecutor may exercise all or any of the rights and powers vested in or exercisable by the Public Prosecutor by or under the CPC or other written law except any rights or powers expressed to be exercisable by the Public Prosecutor personally.

F

[23] In the case of Miss WK Wong, there was nothing in the defence written submission to indicate that she has ever conducted any prosecution at the trial court.

[24] There can be no doubt in my mind that the provisions of s 126(2), and s **G** 377(b) of the CPC have been duly complied with. What has been raised for the defence herein is indeed a non-issue.

.

OPERATIVE DATE OF SIA 1983

H

[25] The defence submitted that the charge alleged the commission of the offence under s 14(1) on 25 February 1994, while the SIA 1983 came into force with effect from 7 March 1996.

[26] The prosecution responded that s 14(1) had already come into force before 25 **I** February 1994, and 7 March 1996 was the date of coming into force of the Securities Industry (Amendment) Act 1996 (Act A943).

[27] In my judgment, s 1 provides that the SIA 1983 'shall come into operation on such date as the Minister may, by notification in the Gazette, appoint.

[28] A perusal of the Gazette PU(B) 332/83 clearly demonstrates that the Minister has appointed 7 July 1983 as the date the SIA 1983 should come into operation. This date also appears at p 5 of the defence bundle of authorities. There can be no two views about this fact.

[29] Subsequent to the enactment of the SIA 1983, numerous amendments had been passed by Parliament, and one such amendment was the Securities Industry (Amendment) Act 1996 (Act A943) which received the Royal Assent on 29 February 1996 and was published in the Gazette on 1 March 1996. However this Amendment Act is of no consequence to s 14(1) which was not within the ambit and purview of Act A943.

.

INGREDIENTS OF THE CHARGE

[30] In order to sustain a charge under s 14(1), it is incumbent on the prosecution to prove that:

(1) the accused has acted as an investment adviser; and

(2) the accused is not a holder of an investment adviser's licence.

.

FINDING OF FACTS

[31] The trial judge's finding of facts may be unfolded in the following narrative:

[32] SP1, an officer from the then Registry of Companies (now the Companies Commission) testified that International Entrepreneurs Network Corporation Sdn Bhd ('IEN') was incorporated on 25 October 1991 and the shareholders cum directors were respectively Nasimah bte Mohd Yusof (the accused's wife) and Yazman bin Abd Aziz (the accused's younger brother).

[33] SP14, IEN's administrative officer, confirmed that the accused had at all material times held the position of senior investment consultant in charge of the daily operations and affairs of IEN in addition to giving SP14 instructions in relation to the management, arrangement of the dates of seminars, ensuring that letters concerning the seminars were duly dispatched to co-ordinators who would procure invitees and that the seminars were properly conducted with overhead projector together with transparencies and white board in proper places. The seminar materials include illustrations of movements and fluctuations of shares and securities listed on the then Kuala Lumpur Stocks Exchange (now Bursa Malaysia) ('KLSE securities'). The accused would finalise the dates for the execution of the agreement with loan providers in connection with the sale and purchase of KLSE securities.

[34] SP14 further testified that a co-ordinator who succeeded in procuring for the accused a client to participate in the purchase of the KLSE securities would be paid a 5% commission on the total amount invested under an agreement.

[35] The evidence of SP4, an employee of a printing company, revealed that the accused had placed an order for printing forms for the invitees to attend the seminars, and business cards describing himself as a senior investment adviser. In his business cards, the accused gave the address at 87B, 2nd Floor, Medan Bonus, Off Jalan Masjid India, 50100 Kuala Lumpur ('the accused's premises') and stated the nature business as follows:

> We provide:
>
> — Latest KLSE Stock Development
>
> — What stock to buy and sell
>
> — What price and transaction time
>
> — Advise on share trading and account management.

[36] Officers from the Securities Commissions, SP7 and SP18 testified that at the time of raiding the accused's premises, the accused was on the KLSE Chilong System in connection with KLSE securities and their sale and purchase prices. At the raid, the accused also gave his business cards to SP7 and SP18.

[37] SP5, 8 and 9, three clients of the accused, confirmed that they attended his seminar on 25 February 1994 in the Bahau Rest House where the accused advised them on the investment in the KLSE securities which were displayed on overhead projectors and graphs. The attendance register showed a group of 20 to 30 participants at the seminar in which the accused also fielded questions from the participants, relating to investments in the KLSE securities.

[38] The accused had, through SP3 the manageress of the Rest House and SP6 the reception staff, made reservation for the hall for which bills for payment were issued.

[39] SP11 Mr Phua Lee Kerk has since 1997 been the head of research in Jupiter Research Sdn Bhd in Kuala Lumpur. He undertakes research and analysis of companies listed on the KLSE, and in the process makes recommendations to clients to buy or sell the listed stocks. His other duties include the preparation of research reports, meeting with clients, and presentations in seminars on KLSE securities for which he has obtained a licence which is renewable annually.

[40] On the above finding of facts, the trial judge held that the prosecution has proved the first ingredient ie that the accused has acted as an investment adviser.

[41] SP17 who was the licensing officer in the Ministry of Finance testified that until 6 March 1996, the Ministry was the licensing authority for an investment adviser's licence which may be given to an individual or a body corporate to carry on the business of advising the public on investing in securities or publishing or distributing analysis or reports concerning securities. The licence, if approved, is renewable annually and that until the month of November 1994, no such licence has ever been issued to any individual. His licensing department has not received any such application from the accused. This was also confirmed by SP2, the officer from

the licensing department of the Securities Commission which was the licensing authority with effect from 7 March 1996.

[42] After a maximum evaluation of the evidence at the close of the prosecution case, the trial judge concluded that the prosecution has also established the second ingredient and called the accused to enter on his defence.

[43] In his defence, the accused admitted that he had given the seminar on the date, time and place as specified in the charge, but denied that he was giving investment advice as he did not know whether he had used the transparencies in his seminar.

[44] The accused denied any knowledge of IEN but admitted being connected with IEN as he was preparing and marketing seminars. He also denied having ordered from SP4 the business cards or distributing them.

[45] SD2, an employee of IEN since 1990 and still so employed in 1994, was in charge of, inter alia, issuing invitations to invitees for the seminars conducted by the accused and that on the date, time and place stated in the charge, the accused was the main speaker in the seminar but not on the sale and purchase of KLSE securities. However, the trial judge found that SD2's evidence in chief and cross-examination show the following discrepancies:

	Evidence in chief	Cross-examination
(1)	The accused did not use transparencies at the seminar	The accused used three transparencies and a projector
(2)	No attendance sheet was prepared	SD2 prepared two attendance sheets for distribution to and filling in by the participants
(3)	10 participants in the seminar	SD2 did not personally record the attendance
(4)	SD2 distributed the invitations to labourers from FELDA only	The invited participants were teachers and technicians

[46] SD3 was invited by the accused to, inter alia, give support to the accused in the seminar for which he was paid an allowance of RM300 but he was not concerned with the attendance sheets.

[47] SD4 attended a seminar conducted by the accused on 21 January 1994 but not the seminar on 25 February 1994.

[48] After considering the entire case, the trial judge found the accused guilty, convicted him and imposed the sentence.

.

A SEIZURE OF THINGS

[49] The defence contended that:

(1) the prosecution through SP18 has failed to comply with s 36A, as a result of which the exhibits seized were inadmissible; and

B

(2) the failure to produce a search list has given rise to an adverse inference under s 114(g) of the Evidence Act 1950.

[50] Support was sought in *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16; *Pavone v Public Prosecutor (No 2)* [1986] 1 MLJ 423; *Teoh Hoe Chye v Public Prosecutor* [1987] 1 MLJ 220; *Mohd Osman bin Pawan v Public Prosecutor* [1989] 2 MLJ 110; *Abdullah bin Yaacob v Public Prosecutor* [1991] 2 MLJ 237.

C

[51] The prosecution responded that:

D

(1) Section 36A came into force on 1 November 1998 vide Amendment Act A1041 and does not apply to the raid conducted on 18 April 1994;

(2) SP18 has issued the original search list to the accused who had acknowledged receipt thereof but SP18 had misplaced the copy when the Securities Commission moved its office;

E

(3) the search list need not be produced, referring to *San Soo Ha v Public Prosecutor* [1968] 1 MLJ 34, 36; and

(4) there was no break in the chain of evidence, relying on *Su Ah Ping v Public Prosecutor* [1980] 1 MLJ 75, 76.

F

[52] In my judgment, it needs to be observed that s 36A(1), which provides for the procedure for seizure of things, came into force on 1 November 1998 vide Act A1041, whereas SP18 conducted an inspection of the accused's premises on 18 April 1994. Hence, the defence cannot therefore rely on s 36A.

G

[53] Be that as it may, the trial judge accepted SP18's evidence at p 249 of the appeal record that after seizure, he did issue an original search list to the accused who then acknowledged receipt thereof. However, the copy which SP18 kept was misplaced due to the relocation of the Securities Commission.

H

[54] An issue of credibility arises here. The trial judge has had the audio visual advantage of hearing the witness, observing his demeanour and correctly accepting his evidence on the non-production of the search list as reasonable and probable.

[55] Even where a search list under s 64 of the CPC had not been prepared by the officer who conducted the search in which several exhibits were recovered, as in *San Soo Ha*, Raja Azlan Shah J (now HRH the Sultan of Perak) at p 36 left column held that the failure to comply with the provisions relating to search list may cast some doubt upon the bona fides of the parties conducting the search and accordingly affords ground for scrutiny; but if after close scrutiny the court arrives at the conclusion that the articles were recovered from the possession of the accused person,

I

it is obviously no defence to say that the evidence was obtained in an irregular manner, and that there is nothing in the law which makes such evidence inadmissible. A

[56] The authorities cited for the defence pertaining to a break in the chain of evidence should now be put in proper perspective. B

[57] In *Abdullah Zawawi*, the issue for determination by the then Supreme Court was:

> Although the prosecution has the right not to call every witness from whom a police statement has been taken, the question is how far does the right extend? C

[58] The Supreme Court held that such right must always be guided by its duty to discharge the onus of proof as the court should not indulge in conjectures and possibilities, especially where unsatisfactory features were found in the prosecution's case which fell short of proof beyond reasonable doubt. D

[59] Where there was patent difference in the findings of the officer from the Drug Enforcement Unit who described the exhibit as 'opium' and 'opiate' while the chemist testified that it contained 'heroin', and the cavalier manner in which the exhibit had been handled, VC George (later JCA) held that they constituted missing links in the chain of evidence. E

[60] The issue in *Teoh Hoe Chye* was whether a failure to call a particular witness gave rise to a serious gap in the prosecution's case pertaining to the identity of the exhibits. Hamid CJ (Malaya), later CJ (Malaysia), delivering the judgment of the Federal Court, held that there was a doubt as to the identity of the exhibit and so a failure to adduce evidence to provide the necessary link in the chain of evidence would be fatal to the prosecution's case. F

[61] In *Mohd Osman*, the prosecution evidence had fallen short of a prima facie case. G

[62] In *Abdullah bin Yaacob*, there was a break in the chain of evidence leading to doubts regarding the exhibits caused by the failure of the prosecution to call the police officer who had received and kept the exhibits from 1985 to 1989. H

[63] By contrast, an examination of the exhibits tendered in the trial court shows that Exhibit P26 is the accused's business card which the defence did not challenge when SP4 and SP18 testified to this effect. I

[64] Exhibits P32(1) to (28) are the transparencies used by the accused in the seminar as confirmed by SP5 and SP14.

[65] Other exhibits have been produced and identified as follows:

JOBNAME: No Job Name PAGE: 16 SESS: 1 OUTPUT: Thu Jan 26 16:46:28 2006
/reports/caseml/case/mlj/2006_001_mlj_380

Documents	Witness
P51 (attendance form)	SP9 who attended the seminar
P73 (the charts); P74 (payment records in chocolate file); P75 (the schedule of seminars in IEN chocolate file)	SP18 who had seized them from the accused's office
P81 and P82 (letters written and signed by SD3 dated 11 April 1994 on the accused's instructions and addressed to the Licensing Officer of the Ministry of Finance, and the Department Of Balance of Payment, respectively)	SD3
P83 and P84 (attendance SD4 forms for the 21 July 1994 and 8 April 1994)	
P85 and P86 (attendance Forms of Wan Liah Wan Salim) and Haris Mahtob to the seminar on 21 April 1994)	

[66] The accused was at all material times having control and management of his premises when exhibits were seized.

[67] On the break in the chain of evidence, it is to be noted that the issue was in relation to the identity of the exhibits seized by SP18. Before the trial judge, the accused had actually confirmed that all the exhibits were seized from the accused's premises and hence the identity of these exhibits had never been doubted.

[68] In *Su Ah Ping*, the appellant led the police to the place where he hid the pistols and ammunition, which were recovered and handed by an inspector to another police officer. The inspector produced and identified the exhibit in court. No other police officers who had handled the exhibits were called upon to testify. In rejecting the defence contention that there was a break in the chain of evidence, Suffian LP (as he then was) at p 76 held that the question was one of identity of the exhibits and that if the officer who picked up an object at the scene produced it and identified it as that very same object, that is enough and there is no need to call every other officer who handled it.

.

PRIMARY EVIDENCE

[69] The defence argued that there was no nexus between the accused and the exhibits seized.

[70] The prosecution submitted to the contrary, adding that the exhibits admitted by the trial court were the original produced through the makers or recipients or persons having control and custody under s 61 of the Evidence Act 1950 and these

witnesses had not been challenged on this issue (see *Pendakwa Raya v Rang Ho Soh* [1992] 1 MLJ 360; *Public Prosecutor v Lin Lian Chen* [1991] 1 MLJ 316, 319; and *Ayoromi Helen v PP* [2005] 1 CLJ 1). A

[71] In my judgment, Exhibit P26 is the accused's business card produced through the printer (SP4) and Exhibits P32(1)–(28) the transparencies used by the accused had been proved through SP4 the printer and SP14 IEN's administrative officer in the form of primary evidence in accordance with the best evidence rule as they were produced for the inspection of the trial court under ss 61, 62 and 64 of the Evidence Act 1950. Any exhibit can be produced by the maker or by any person who originally recovered the said exhibit (eg the officer who conducted the raid or search) per Mohtar Abdullah J (later FCJ), at p 319 right column in *Lin Lian Chen*. B C

[72] Hence, these exhibits cannot be likened to those exhibits which were not produced through the makers and the original had not been tendered under the best evidence rule, as in *Kang Ho Soh*, where Shankar J (later JCA) held that the evidentiary value of photostat cheques was worthless. D

[73] Further, it is to be observed that the production of the exhibits P26 and P32(1)–(28) by SP5 and SP18 had not been challenged by the defence in cross-examination. It is trite law that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony: per Raja Azlan Shah CJ(M) (now HRH the Sultan of Perak) in *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 at p 213, as applied by Augustine Paul JCA in delivering the judgment of the Court of Appeal in *Ayoromi Helen v Public Prosecutor*. E

[74] In the circumstances, I am of the view that the above defence contention is devoid of merits. F

.

CONFLICT OF INTEREST AND PREJUDICE

[75] The defence contended that SP18 is both the investigating officer and the complainant. Hence, his entire evidence should be ignored, since eg a complainant alleging rape cannot also be an investigator, because of conflict of interest and prejudice. G

[76] The prosecution argued that SP18 is not a complainant although his name appeared in the charge sheet as such. H

[77] I am of the view that in order to establish SP18's conflict of interest and prejudice, there must be some evidence adduced by the defence through the cross-examination of SP18 but this has never been done. An analysis of SP18's relevant evidence reveals that on 18 April 1994, he was instructed to conduct an inspection of the accused's premises which the defence did not challenge, and although the charge sheet has described SP18 as 'pengadu' (ie complainant), I am unable to accept the defence contention that SP18 be equated as a complainant-victim in a rape case. I

A .

INVESTMENT ADVICE AND ADVISER

[78] It was argued for the defence that the incident on 25 February 1994 at the Bahau Rest House did not come within the words 'carries on a business' as contained B in the definition of 'investment adviser' under s 2 and that the accused had actually conducted the seminar for IEN.

[79] The prosecution submitted that the accused had acted as an investment adviser and that he was the directing will and mind having control and management C of IEN, and so the corporate veil should be lifted, on the basis of:

(1) *Hyde v Sullivan & Ors* [1956] SR (NSW) 113, 119;

(2) *Trade Facilities Pte Ltd & Ors v Public Prosecutor* [1995] 2 SLR 475; and

(3) *Abdul Manaf Mohd bin Ghows & Ors v Nusantara Timur Sdn Bhd & Ors* [1996] MLJU 130. D

[80] I shall first refer to s 2 which where relevant part defines 'investment adviser' as meaning 'a person who—

a carries on a business of advising others concerning securities; or E

b as part of a business, issues or promulgates analysis or reports concerning securities;'

[81] It is abundantly clear to me that a person becomes an investment adviser if he does one of the two things as enumerated in (a) or (b) above. F

[82] The New South Wales Court of Appeal in *Hyde v Sullivan* explained that the phrase 'to carry on business' means to conduct some form of commercial enterprise, systematically and regularly, with a view to profit, and implicit in this idea are features of continuity and system.

G

[83] In my view, the above finding of facts by the trial judge has amply demonstrated that the accused has acted as an investment adviser by giving investment advice as a commercial enterprise and in the form of a suggestion or recommendation to a specific person or group of persons in relation to investing in H the KLSE securities, and that requires technical analysis on fundamentals, by showing the form and history of the movement in the price of the shares in charts and transparencies, for the purpose of giving indications of when to buy or sell these securities, systematically and regularly. The paraphernalia used by the accused consists of system and continuity. The complete factual matrix established in the evidence adduced by the prosecution in its entirety shows that is not confined to the I seminar per se held in the Bahau Rest House on 25 February 1994. That has been analysed by the trial judge in relation to the accused's own evidence. The finding of facts by the trial court clearly comes within para (a) or (b) in the definition of 'investment adviser' under s 2.

.

CORPORATE VEIL

[84] The defence contention is that it was not the accused who was involved in acting as an investment adviser, but IEN did and so the accused applied the corporate veil to attribute the liability to IEN. The prosecution argued that the accused could not do so.

[85] In my view, defence submission confirms my view that there is indeed a carrying on of the business of acting as an investment adviser under s 2. This issue of shifting the liability to IEN is best resolved by an analysis of the authorities.

[86] [86] In *Trade Facilities*, one Looi was the directing mind and will of the company, Trade Facilities. He instructed an agent in Tokyo to look for buyers of Hennessy XO in Japan. The actual negotiation was between the agent in Japan and the buyer there but Looi gave instructions from Singapore as to the price and terms. The Hennessy XO were delivered to Japan. The buyers suspected the goods were counterfeit and demanded a refund, for which Looi arranged for a letter of credit. Trade Facilities was named as the shipper when the goods were sent to Japan, and when they were returned, it was named as the consignee and the party to be notified. Its letterhead was used in the correspondences with the Japanese agent and the buyer. The goods were seized in Singapore on their return before they had gone through customs, as they were found to be adulterated.

[87] [87] One of the issues raised before Yong Pung How CJ of Singapore was whether it was an appropriate case to lift the corporate veil so as to make Looi personally liable. The learned Chief Justice gave the answer in the affirmative, as Trade Facilities was a vehicle that Looi employed as and when it suited him.

[88] [88] In *Abdul Manaf*, Anuar J (later CJ(M)) gave a comprehensive treatment of 'corporate veil', as follows:

> I will now consider what I understand by the expression 'corporate veil'. As has often been said, a company has its own legal personality distinct from its members and officers and is frequently described as an artificial person (see *Foss v Harbottle* (1843) 2 Hare 461, and *Salomon v A Salomon & Co Ltd* [1897] AC 22 HL). Because it has a legal personality and a separate legal entity of its own distinct from its members or directors there have been and will be instances where its members or controllers hide behind its corporate entity or are otherwise hidden from view or shielded by what has come to be described as its corporate veil to manipulate it fraudulently for unjust personal gains. Because of the separate corporate entity, the court does not ordinarily lift the corporate veil, but in an exceptional case where the evidence shows that the members or controllers of company manipulate it for their own fraudulent or sham purposes for their unjust personal gains the court, in order to do justice, will not hesitate to lift the corporate veil by cutting across the legal boundary of corporate structure in order to see the real faces and discover the true identities of these members or controllers who use the company as extension of themselves and make them personally liable or responsible for the debts or liabilities of the company where the evidence justifies such a remedy.'

[89] [89] On the facts of this case, I am of the view that the accused cannot apply and hide behind the corporate veil for the purposes of attributing to IEN the carrying on of the business as investment adviser when there is overwhelming evidence that he personally conducted such business and acted as an investment adviser. IEN was merely a vehicle used by him to suit his convenience, and so he certainly cannot use the veil as a cloak to avoid his liability under the SIA 1983.

.

POLICE REPORTS

[90] The defence urged the court to draw an adverse inference under s 114(g) of the Evidence Act 1950 as the prosecution has failed to produce two police reports viz Bahau Report IP/No 12/94 and Dang Wangi Report 23088/94, thereby depriving the accused of the right to cross-examine the makers. Public *Prosecutor v Abdul Razak bin Johari* [1991] 1 MLJ 105; and *Tan Cheng Kooi & Anor v Public Prosecutor* [1972] 2 MLJ 115 were cited.

[91] The prosecution clarified that:

(1) Bahau Report IP/No 12/94 is actually the investigation paper compiled by SP18 while Dang Wangi Report No 23088/94 is the report on the accused's arrest; and so they are not first information reports, referring to *Public Prosecutor v Mohamad Musa bin Amarullah* [2002] 1 MLJ 561; *Public Prosecutor v Abdul Latiff bin Abdullah* [1995] MLJU 219; and *Public Prosecutor v Foong Chee Cheong* [1970] 1 MLJ 97; and

(2) there is no withholding or suppression of evidence and so s 114(g) does not apply, relying on *Munusamy v Public Prosecutor* [1987] 1 MLJ 492.

[92] In my judgment, the answer may be discerned by referring to ss 107 and 108A of the CPC which merit reproduction as follows:

> 107. Information (i) Every information relating to the commission of an offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction and be read over to the informant.
>
> (ii) Every such information shall be entered in a book to be kept by such officer, who shall append to such entry the date and hour on which such information was given, and whether given in writing or reduced to writing as aforesaid shall be signed by the person giving it.
>
> 108A. Admission of certified copy of information as evidence In any proceeding under this Code a copy of an entry relating to an information reduced to writing under the provisions of s 107 or of section 108, and purporting to be certified to be a true copy by the Officer in Charge of the Police District in which the police station where the information given is situated, shall be admitted as evidence of the contents of the original and of the time, place and manner in which the information was so recorded.

[93] A revisit to some of the relevant principles governing a first information report may prove useful and I shall attempt to distill them as follows:

(1) The first information report refers to the initial information relating to the commission of an offence given to the police under s 107 of the CPC, and is

usually made very early after the occurrence of the offence and forms the basis of the case, upon which the police will commence their investigation (see *Mallal's Criminal Procedure* (5th Edition, 1998) p I 182 paras 4151 and 4152);

(2) A first information report serves as a complaint to the police to set the criminal law in motion and seeks to obtain early information of alleged criminal activity and to record the circumstances before there is time for them to be forgotten or embellished (Ibid, p I 1824, para 4176; per Lord Porter in *Emperor v Khwaja Nazir Ahmad AIR* 1945 PC 18 at p 20, as referred to in *Balanchandran v PP* [2005] 2 MLJ 301, at p 309 para 9 per Augustine Paul JCA);

(3) A certified copy of the first information report is admissible as evidence of the contents of the original ie it takes the place of the original and its evidentiary evidence would remain on the same footing as that of the original: *Balachandran*, applying s 108A of the CPC;

(4) The evidentiary value of a first information report is only to contradict the testimony of a witness under s 145 of the Evidence Act 1950; or to corroborate his testimony under s 157 of the Act, the operation of which is as explained in *Lim Guan Eng v PP* [2000] 2 MLJ 577.

(5) A first information report is not substantive evidence of its contents: *Balachandran*, at p 310 para 11; per Chang Min Tat J (later FJ) in *Tan Cheng Kooi*, at p 118; per Kang Hwee Gee JC (now J) in *Abdul Latiff*.

(6) Where the evidence of a single witness who has made a first information report is vague, it is most desirable to tender it in evidence in order to enhance his credibility: *Chin Khing Siong v Rex* [1952] MLJ 74 and *Ooi Hock Leong v Regina* [1955] MLJ 229.

(7) Where a first information report is not tendered in evidence in such a situation as in para 6 above, the evidence of the witness stands to be rejected, not because it lacks corroboration but because it may not pass the test of credibility and reliability on its own, and it is only to that extent that the failure to produce the first information report is fatal: *Balachandran*, p 311 para 12; *Abdul Razak Johari*, per James Foong JC (now J);

(8) If a first information report contradicts the evidence of a witness, it is the duty of the defence to use it in order to attack the credibility of the witness, and where that has not been done, it would be a contradiction in terms for the defence to ask for an adverse inference to be drawn against the prosecution for failure to adduce it in evidence, as the failure of the defence to use it as described may lead to the inference that it is not adverse to the evidence of the witness, so that an adverse inference cannot be drawn against the prosecution for failure to tender it in evidence: *Balachandran*, at p 311 para 12.

(9) A report pertaining to the arrest of an accused is not a first information report but is an arrest report: *Balachandran*, p 311 para 13.

[94] In the instant case, Dang Wangi Report 23088/94 which was made pursuant to the arrest of the accused is an arrest report and not a first information report and so its non-production is not fatal to the prosecution's case.

[95] The Bahau Report IP No 12/94 is also not a first information report as it consists of the investigation papers.

[96] Non-production of these reports can attract no adverse inference under s 114(g) of the Evidence Act 1950. Such an inference can only be drawn if there is withholding or suppression of important and material evidence and not merely on account of failure to obtain evidence: per Mohamed Azmi SCJ in *Munusamy*, at p 494 left column B-C, Supreme Court.

.

DEFENCE EVIDENCE

[97] The defence contended that the trial court has not duly considered the defence evidence.

[98] The prosecution argued that the defence was an afterthought, a mere denial and that the finding of the trial court was correct. *Muhammad Faizal Sundrajan bin Abdullah v Public Prosecutor* [1998] 7 MLJ 465, 468; and *Public Prosecutor v Krishna Rao a/l Gurumurthi & Ors* [2000] 1 MLJ 274, 317 were cited.

[99] In my judgment, it needs to be noted that the accused's original defence was that his younger brother one Yazman Ab Aziz had conducted the seminar. However, the accused then shifted his defence wherein he admitted he was the one conducting the seminar but did not give any investment advice, although this line of defence was not put to any of the three prosecution witnesses viz SP5, 9 and 14 who were at the accused's seminar.

[100] It seems to me that the shifting of defence by the accused was a mere afterthought which may rightly be rejected (see *Muhammad Faizal*, p 469F per Abdul Wahab Patail J) so also a bare denial (see *Krishna Rao*, at p 317C per Kang Hwee Gee J).

[101] Upon a proper perusal of the appeal record, I hold that the trial judge has undertaken an assessment and evaluation of the evidence adduced, having regard to the demeanour, veracity, reliability and credibility of the witnesses. The finding is not against the weight of evidence. Acting in an appellate capacity, I will not readily interfere with such finding as it is a primary duty entrusted to the trial court.

.

STANDARD OF PROOF

[102] The defence contended that the trial judge had failed to consider the standard of proof required throughout the trial ie beyond reasonable doubt, and that the accused has cast a reasonable doubt, deriving support from *Mat v Public Prosecutor* [1963] MLJ 263 and *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89.

[103] The prosecution replied that:

(1) the trial judge has applied the correct standard of proof beyond reasonable

doubt throughout the trial and that the accused by failing to produce a licence has not rebutted the case for the prosecution on a balance of probabilities, citing s 106 of the Evidence Act 1950; *Reg v Khoo Quan Teik* [1957] MLJ 128; and *Tan Koh Keng v Public Prosecutor* [1962] MLJ 193; *Saminathan & Ors v Public Prosecutor* [1955] MLJ 121; *Subramaniam a/l Arumugam v Public Prosecutor* [2000] 2 MLJ 193; and *Public Prosecutor v Md Nor bin Hamid* [2004] 5 MLJ 97; and

(2) The existence of a licence is a question of fact based on evidence, referring to *K Saravanan a/l S Karuppiah v Public Prosecutor* [2002] 3 MLJ 465.

[104] In respect of the investment adviser's licence, I am of the view that as it is a fact which is especially within the knowledge of the accused, the burden of proving that fact is upon him: s 106 of the Evidence Act 1950; *Khoo Guan Teik*, at p 128 right column; and *Tan Koh Keng*, at p 193 left column. The accused may do so by showing on a balance of probabilities ie that he probably had such a licence: see *Saminathan*, at p 124 right column; *Subramaniam*, at p 203A; *Md Nor bin Hamid*, at p 107 para 26 following *Yuvaraj*; and *Thavanathan a/l Balasubramaniam v Public Prosecutor* [1997] 2 MLJ 401 per Chong Siew Fai CJ (Sabah and Sarawak).

[105] A consideration of the defence evidence clearly confirms that the accused never had the licence at all.

[106] My perusal of the notes of proceedings at p 287, and the grounds of decision at p 566 of the appeal record reveals that at the close of the case for the prosecution, the trial judge had after a maximum evaluation of all prosecution evidence, applied the standard of proof beyond reasonable doubt in finding that the prosecution had established all the ingredients of the charge under s 14 of the SIA 1983, thereby calling the accused to enter upon his defence.

[107] The charge relates to an offence which was alleged to have taken place on 25 February 1994 ie before the amendment to s 180 of the CPC (for trials before the High Court) (ie s 173(f) of the same Code for summary trials) setting out the prima facie standard at the close of prosecution's case) came into force on 31 January 1997. Hence, the Federal Court decision in *Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1 that the standard of proof required from the prosecution at the close of its case is the usual criminal standard of proof, to wit, beyond reasonable doubt, which called for a maximum evaluation of the evidence tendered by the prosecution.

[108] At the close of the defence case, the notes of proceedings at p 535 and the grounds of decision at pp 579 and 580 of the appeal record show that upon a maximum evaluation of the entire evidence ie for the prosecution and for the defence, the trial judge found that the defence had failed to raise any reasonable doubt in the case for the prosecution, and that the prosecution had proved its case beyond reasonable doubt.

[109] The trial judge's grounds of decision at p 580 added that the defence has failed to rebut the prosecution's case on a balance of probabilities and hence the prosecution has proved its case beyond reasonable doubt.

[110] Upon a re-examination of the evidence adduced before the trial judge, I am of the view that the trial judge has arrived at a correct finding based on the standard beyond reasonable doubt and that the evidence adduced before the trial court is overwhelming.

.

SENTENCE

[111] In the cross-appeal by the prosecution against the sentence, it was argued that:

(1) the fine does not reflect the seriousness of the offence committed by the accused. *Mohamed Jusoh bin Abdullah & Anor vs Public Prosecutor* [1947] MLJ 130; and *Mohd Jalani bin Saliman & Anor v Public Prosecutor* [1997] 5 MLJ 551 were referred to;

(2) the offence is planned, and not merely technical and so calls for a deterrent sentence, citing *Public Prosecutor v Loo Chang Hock* [1988] 1 MLJ 316; *Hasanuddin bin Abd Hamid v Public Prosecutor* [2002] 2 MLJ 157;

(3) the accused's unremorsefulness is an aggravating factor, and so the sentence must send a message to future securities offenders, as in *Public Prosecutor v Roslan bin Imun* [1999] 3 MLJ 659; and

(4) the accused's personal factors should not be given too much weight.

[112] The defence in appealing against the sentence argued that the accused is a 47 year old first offender who has committed a technical offence for which a non-custodial sentence is justified.

[113] In my judgment, the process of sentencing is purely an exercise of discretion and there can be no rigid formulation of mathematical precision, because the discretion has to be exercised by the sentencing court according to the facts and circumstances of each particular case eg nature of the offence, circumstances in which it was committed, the degree by deliberation, age, character and antecedents of the accused (see *Mohamed Jusoh*, at p 131 per Willan CJ).

[114] There must be a balancing of public interest with the accused's individual interest, and public interest may call for a deterent sentence to see that the accused repents and to deter him as well as other similarly mind persons from committing the same offence: see Mohd Jalani, at p 581 C–D per Abdul Malik Ishak J.

[115] A deterent sentence is appropriate if the commission of an offence is preceded by premeditation and planning with due deliberation and professional skill, but not in respect of an offence committed on the spur of the moment: *Loo Chang Hock*, at p 3181 per Zakaria Yatim J (later FCJ); *Hassanuddin*, at p 171 and p 172 per Richard Malanjum J (now JCA); and *Roslan*, at p 671 per Abdul Malik Ishak J.

[116] The above principles are of general application.

[117] The question of overriding importance before me is whether the trial judge has erred in imposing the sentence. The trial judge's grounds of decision did indicate that public interest had been taken into consideration which has been balanced with the accused's individual interest, having regard to the facts and circumstances of this case.

[118] Parliament has pursuant to s 123 set a maximum fine of RM500,000 or five years imprisonment or both, and this has also been considered by the trial court.

[119] It is trite law that an appellate court will not interfere with the decision of the court below on the question of sentence unless eg:

(1) the trial judge has proceeded on wrong principles: *Rex v Leo De Cruz* [1935] MLJ 1 CCA per Huggard CJ;

(2) there is manifest error, either in law or in considering the facts and circumstances, or an omission to consider such facts and circumstances: *Rex v Tea Cheng Lion* [1949] MLJ 170 per Gordon-Smith J; or

(3) an essential principle of justice has been infringed in such circumstances as to occasion a substantial miscarriage of justice: per Mohamed Azmi SCJ (as he then was) in *Ramli Kechik v Public Prosecutor* [1986] 1 CLJ 308; [1986] CLJ (Rep) 243 SC. (See also *Public Prosecutor v Shari Mohd Shariff* [2005] 5 CLJ 439 at p 449 HC).

[120] [120] In this case, I am of the view that the trial judge has occasioned no error in the exercise of discretion in imposing the sentence.

.

CONCLUSION

[121] [121] On the foregoing grounds, I affirm the entire decision of the trial judge with the result that the accused's appeal against conviction and sentence, as well as the prosecution's cross-appeal against sentence are hereby dismissed.

Appeal and cross appeal dismissed.

Reported by John Paul Simon